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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

WRITER'S DIRECT NO.

(202) 828-0155

August 22, 2000

**BY HAND**

Ms. Magalie R. Salas  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: Written Ex Parte Presentation  
CC Docket No. 94-102

Dear Ms. Salas:

On behalf of my client QUALCOMM Incorporated ("QUALCOMM"), this is to provide the Commission and the staff of the Wireless Telecommunications Bureau with additional information and arguments showing that the waiver request advocated by VoiceStream Wireless ("VoiceStream") in this proceeding is legally defective and is not in the public interest.

**I. Background**

In a letter to the Commission dated July 31, 2000, VoiceStream reported a telephone conversation with FCC staff "concerning certain aspects of VoiceStream's petition for waiver in this proceeding." However, VoiceStream has not filed any petition for waiver in this proceeding.

Rather, on February 5, 1999, Aerial Communications ("Aerial"), on behalf of its subsidiaries APT Houston, Inc., APT Tampa/Orlando, Inc., APT Minneapolis, Inc., APT Columbus, Inc., APT Kansas City, Inc., and APT Pittsburgh Limited Partnership, filed a petition to waive Section 20.18 (e) of the Commission's rules. Aerial's petition requested that the Commission allow Aerial to implement a handset solution for new handsets, arguing that carriers with smaller customer bases have a much smaller set of customers over which to spread the higher costs of network solutions. Aerial Petition at 5. Aerial also noted that existing handset and network functionality can be utilized to provide ALI information for non-ALI capable handsets, which would exceed the Commission's Phase I requirements, not meet the Phase II requirements, but which would be sufficient to allow emergency services operators to dispatch

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personnel immediately to the caller's vicinity while the operator obtains address information from the caller. Id. at 6-7. Finally, unrelated to the request just summarized, Aerial's petition asked the Commission to modify the accuracy requirement to 200 meters 67 percent of the time for use of ALI in a vehicle, irrespective of the particular positioning method used by a carrier, whether a handset or network-based solution. Id. at 8-9.

The Commission dismissed Aerial's petition as moot in its Third Report & Order, FCC 99-245, released October 6, 1999. Aerial filed a petition for reconsideration, largely complaining about the "unexpected" increase of the accuracy requirements in the Third Report & Order. See Aerial Petition for Reconsideration (filed Dec. 6, 1999). In that pleading, Aerial contended that disparate accuracy standards for network-based and handset-based solutions "serves no logical purpose," and to require different accuracy standards for the two types of solutions "only serves to destroy competitive neutrality." Aerial Pet. for Recon. at 3-4.

Apparently, after Aerial was merged into VoiceStream on May 4, 2000, Aerial's waiver request on behalf of its six operating subsidiaries somehow became a waiver request applicable to all of VoiceStream's PCS systems throughout the country, although VoiceStream has never amended the Aerial waiver request. See Ex Parte Presentation of VoiceStream dated May 5, 2000. We say "somehow" because VoiceStream has not filed a document with the Commission requesting a waiver of the rules for its systems, much less presenting a public interest rationale for this expansion of Aerial's original request.

Aerial's request sought a waiver only for the Aerial systems and referred to Aerial's small customer base, a far cry from VoiceStream's much larger customer base across the country. Aerial owned PCS licenses covering approximately 28.1 million people; VoiceStream, which now includes Aerial, owns PCS licenses covering approximately 170 million people. No basis has been shown on the record for such an expansion of Aerial's waiver request, given that the premise of the waiver request is inapplicable to VoiceStream, a much larger carrier. Nevertheless, VoiceStream's July 31, 2000 filing refers to "VoiceStream's petition for waiver," and treats this petition as if it were a request made on behalf of all of VoiceStream's PCS systems, even though there is no such petition on file with the Commission.

Moreover, the new VoiceStream waiver request set forth in the May 5, 2000 ex parte asked for a waiver of the rule set forth in the Third Report & Order that a handset-based solution be accurate within 50 meters for 67 percent of calls; VoiceStream asked that it be permitted to implement a handset based solution (known as E-OTD) accurate to 100 meters. See Ex Parte Presentation of VoiceStream dated May 5, 2000.

Finally, VoiceStream's July 31, 2000 filing states that its Network Software Solution (for legacy handsets) would enable VoiceStream to locate handsets within a radial accuracy of 500-1000 meters for 67 percent of calls and would yield a searchable area of one-half to one square kilometer, for a suburban area with a 7 kilometer distance for cell sites. The filing does not state the searchable area for rural areas served by VoiceStream, in which sites are typically more than 7 kilometers apart. The filing asks for a grant of the "VoiceStream waiver" so that investment and deployment of a full ALI Phase II solution can proceed.

## **II. VoiceStream's Attempt to Obtain a Waiver Is Legally Deficient**

VoiceStream has not filed a waiver request. Aerial filed a waiver request, but that request is not the request that VoiceStream is asking the Commission to grant. A major premise of Aerial's request was that a waiver was warranted because Aerial was a carrier with a smaller customer base. That premise does not apply to VoiceStream, a much larger, major national carrier. Voice Stream, through ex parte presentations, apparently seeks a waiver of the accuracy requirements found by the Commission in the Third Report & Order to be necessary for the public interest, and yet there is not a single pleading filed by VoiceStream in this proceeding setting forth a public interest rationale for such a waiver, much less any showing that the relaxed accuracy will meet the needs of public safety.

Above all, VoiceStream has failed to show that a grant of a waiver will not eviscerate the Commission's accuracy requirements. Other carriers may well seek a similar waiver if the Commission grants a waiver to VoiceStream; there is nothing in the record to suggest a standard the Commission can use to deny these other waivers to prevent its accuracy rules from losing all force, and the resulting harm to the public safety. The Commission is legally required to grant a waiver only upon an appropriate general standard, and the Commission must articulate the nature of the special circumstances facing the proponent of the waiver to prevent discriminatory approaches and to put future parties on notice. Northeast Cellular Telephone Company, L.P. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990). The Commission cannot grant a waiver where the record reveals nothing unique about the situation faced by the party seeking the waiver. Id. at 1166. Here, VoiceStream has not shown anything unique about its situation, and on that basis alone, the Commission should deny its waiver request.

There is no legal basis for granting this waiver to VoiceStream. VoiceStream has not filed a waiver request; cannot rely on Aerial's waiver request because it is not the request VoiceStream is lobbying for; and, has not met the Commission's standard for grant of a waiver. See, 47 C.F.R. §1.925, 1.3. As the Commission has held, "(i)t is well established that the burden is on a waiver applicant to 'plead with particularity the facts and circumstances which warrant'" a waiver. Saddleback Community College, 11 FCC Rcd 11938, 11941 (1996), quoting WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). See also Columbia Communications, DA 00-702 (Intl. Bur.), released April 5, 2000 at ¶19. The applicant for waiver "must articulate a specific pleading, and adduce concrete support, preferably documentary." WAIT Radio, 418 F.2d at 1157 n.9. There is no legal authority for the Commission to ignore these legal standards for VoiceStream and instead to grant a waiver requested through ex parte presentations which fall well short of making the showings legally required for grant of a waiver.

Under the Commission's rules, a wireless carrier seeking a waiver must show that the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or in view of unique or unusual factual circumstances of the instant case application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. §1.925(b)(3). See also Omnipoint Request for Broadband Declaratory Ruling or Waiver, DA 00-1767, rel. Aug. 4, 2000 (WTB). The Commission's rules

require that requests for waiver contain a complete explanation as to why the waiver is desired. 47 C.F.R. §1.925 (b)(2).

VoiceStream has not met any of these legal standards. VoiceStream has not plead with particularity the facts and circumstances which warrant a waiver. There is no pleading on file by VoiceStream seeking a waiver, much less showing why this major national carrier should be granted a waiver under the standard in the Commission's rules. Aerial's petition was based on the facts and circumstances applicable to Aerial, not VoiceStream. Moreover, Aerial's petition was filed before the Commission established the 50 meter accuracy rule was promulgated in the Third Report & Order, and thus Aerial's petition made no showing as to why that rule should be waived.

There is no legal basis for the Commission to allow VoiceStream to avoid the legal requirements of pleading the facts and circumstances it relies on for whatever waiver it seeks, and instead for VoiceStream to make its waiver requests through ex parte meetings with Commission staff. By failing even to meet the pleading requirement, VoiceStream has necessarily failed to make the required showing that a waiver would be in the public interest or why unique or unusual facts compel a waiver, and as QUALCOMM showed in its prior ex parte presentations in this proceeding, VoiceStream, a GSM carrier, cannot show that it has no reasonable alternative to a waiver because QUALCOMM's technology can be used to provide wireless assisted GPS service that would meet the Commission's accuracy requirements, if VoiceStream chose that technology and placed orders with handset manufacturers for phones incorporating the technology. The Commission cannot legally grant a waiver to VoiceStream under these circumstances. And, if the Commission were to grant a waiver to VoiceStream, other carriers who, like VoiceStream, did not file a waiver request are sure to demand that they too be granted similar waivers.

VoiceStream's failure to file a waiver request at all, much less a request that meets the applicable legal standards, is especially telling in light of VoiceStream's attempt to avoid the accuracy requirement in the Third Report & Order. In the Third Report & Order, the Commission found that it is "appropriate and reasonable" to require a higher level of accuracy for handset-based solutions because of the longer phase-in period carriers using a handset-based solution will enjoy. *Id.* at ¶74. The Commission noted that the 100 meter standard applicable to network solutions would yield a search area of 31,416 square meters, but the 50 meter standard would yield a search area only a quarter the size, 7,854 square meters. Thus, the Commission made a public interest finding that "(h)aving this smaller expected search area should significantly facilitate and speed emergency response." *Id.* VoiceStream has not provided the Commission with any basis for waiving a rule so deeply rooted in the public interest.

Indeed, VoiceStream's July 31, 2000 filing shows that VoiceStream's Network Software Solution will, under optimal circumstances, yield a searchable area of one-half to one square kilometer. There is no basis for the Commission to find that such a large area would be sufficient to allow emergency services operators to dispatch personnel immediately to the caller's vicinity while the operator obtains address information from the caller, as Aerial originally stated. Precious private and public resources should be devoted to implementing solutions that

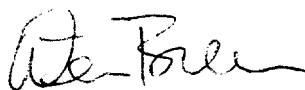
will yield the accuracy that the Commission has found to be necessary to protect public safety. To grant a major national carrier a waiver based on such inadequate service will invite other carriers to request similar waivers, will divert resources away from prompt implementation of the solutions that can save lives, and ignores the record of this proceeding. It would be contrary to Commission rules and governing law to grant such an extraordinary waiver without even a written request from the carrier making the required showing as to why such a waiver is necessary.

Moreover, there is a substantial question as to whether VoiceStream will ever be able to deploy fully E-OTD technology throughout its network. As the attached coverage maps reflect, major portions of VoiceStream's network in rural areas consist of thin coverage along major interstate highways. E-OTD relies on a triangular arrangement of cell sites, but VoiceStream has not made any showing that its cell sites in rural areas along these highways are arranged such that triangulation is possible. The coverage appears to be in a straight line up and down these highways, not in a pattern suitable for triangulation. The only way around this problem for VoiceStream would be to add numerous receiver sites all across the country, but VoiceStream has not shown and cannot show that it can obtain the required zoning approvals from hundreds, if not thousands, of local authorities to accomplish this in any reasonable time frame. Before the Commission grants VoiceStream any waiver of its accuracy requirements, there would have to be a detailed showing that VoiceStream could triangulate throughout its network, a showing that has not been made.

### **III. Conclusion**

For the reasons presented herein, and for the other reasons advanced by QUALCOMM in this proceeding, QUALCOMM urges the Commission to deny VoiceStream's waiver request.

Sincerely yours,



Dean R. Brenner  
Attorney for QUALCOMM Incorporated

cc: Chairman William E. Kennard  
Commissioner Susan Ness  
Commissioner Gloria Tristani  
Commissioner Michael Powell  
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